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IN THE

Supreme Court of the United States

OCTOBER TERM, 1946.

No. 86

GEORGE WILLIAM DODEZ, *Petitioner*,

v.

UNITED STATES OF AMERICA, *Respondent*.

PETITIONER'S REPLY BRIEF.

HAYDEN C. COVINGTON,
VICTOR F. SCHMIDT,
Counsel for Petitioner.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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The petitioner in this case objects to the Government's suggestion as to the disposition of the case upon a remand to the trial court because the Government attempts to limit the rights of the petitioner upon a remand to a new trial. Petitioner is entitled to more than a new trial. He is entitled to have the indictment dismissed by the trial court, which should be required to order the discharge of petitioner.

Upon the trial in the district court all material parts of the entire draft board file were received into evidence. It is true that upon the trial the court committed many procedural errors in excluding evidence in respect to the failure of the local board to give petitioner a full and fair hearing

and in charging the jury and in refusing the petitioner's requested charges, all of which require that the judgment should be reversed and a new trial ordered.

But also upon the trial the evidence was fully developed on whether the draft board arbitrarily and capriciously classified the petitioner and illegally denied him his claim for exemption as a minister of religion under the Act and Regulations.

The illegality of the administrative action in this respect was squarely presented to the trial court upon the motion for a directed verdict and for a judgment of acquittal filed at the close of the evidence in the case. (R. 5, 6-7, 8, 65) The motions were overruled. (R. 65) Exceptions were taken to these rulings. (R. 66) These exceptions were duly brought forward in the assignments of error. (R. 139) The court of appeals passed upon the validity of the classification and administrative action and held that it was not invalid. (R. 191-200) The errors of the court in holding that the trial court did not commit an error in overruling the motions were brought forward to this court in the petition for writ of certiorari. (See the petition pages 2-3, 9). These errors are complained of in petitioner's main brief. (See pages 14-15, 20-21) In the petition (p. 12) as well as in the petitioner's main brief (p. 69) petitioner requests the court to reverse the case, order the indictment dismissed and discharge the petitioner from custody.

While the Government concedes that there is a "nice question concerning the factual foundation upon which the board's classification rests" (see Government's brief p. 16) it merely suggests that the case be remanded for a new trial so that it can decide whether to *nol prosse* the indictment. This relief requested by the Government is not sufficient. It does not guarantee to the petitioner that justice will be done. The case has been fully developed because the entire draft board file was received in evidence. Upon another trial there will not be any new or additional evidence on the illegality of petitioner's classification.

The petitioner has a right to request this court to protect him from the trouble and expense of going through another trial in this case by *holding now* that the indictment should have been dismissed. He should not be put to the uncertainty of what the Selective Service System will advise the Department of Justice as to the correctness of petitioner's classification. The Selective Service System has already considered his claim for exemption and in passing upon it denied his claim. It is assumed that inasmuch as the System referred Dodez to the Department of Justice for prosecution that the System will be consistent and advise the Department again that he was properly denied exemption. The inclination of the Government to the view that petitioner may have been illegally classified now should be taken by the Court as grounds for *ordering now* that the indictment be dismissed and that petitioner be discharged.

On many previous occasions before this Court counsel for petitioner have argued as to the ministerial status of Jehovah's Witnesses and the illegality of draft board determinations in denying them their claim for exemption as ministers of religion. It should not now be necessary to again repeat such argument here. The invalidity of the draft board action in denying petitioner his claim for exemption as a minister of religion is fully established by the argument made by counsel for petitioners in the cases styled *Smith* v. *United States*, and *Estep* v. *United States*, Nos. 66 and 292, October Term, 1945. (See Joint Brief for Petitioners in those cases pages 131-190.) Reference is here made to such argument. It is incorporated herein as though copied at length herein. See also the Petitioner's Reply Brief Reargument in *Gibson* v. *United States*, No. 23, October Term, 1946 (pages 11-19). For each and every one of these reasons the undisputed evidence shows that the administrative action is illegal because of the fact that the decision of the board was illegal, arbitrary and capricious and without basis in fact. *Estep* v. *United States*, 66 S. Ct. 423; *United States* ex rel *Hull* v. *Stalter*, C. C. A. 7th, 151

F. 2d 633; *United States* ex rel *Trainin* v. *Cain*, C. C. A. 2d 144 F. 2d 944, certiorari denied, 323 U. S. 795; Ex parte *Cain*, 39 Ala. 440; *Offord* v. *Hiscock*, 86 L. J. K. B. 941; *Wise* v. *Withers*, 3 Cranch 329; *Murdock* v. *Pennsylvania*, 319 U. S. 105, 106-109, 110, 111, 117; *Lehr* v. *United States*, 139 F. 2d 919, 921-922. See also the Petition for Writ of Certiorari in *Swaczyk* v. *United States*, No. 290 October Term, 1946, pages 15-18, 21-41.

It is fundamental that if the undisputed evidence shows that the petitioner is not guilty of the offense charged it is the duty of the appellate court to render a judgment dismissing the indictment which should have been rendered by the trial court. Since the draft board file is all in evidence it is manifest that a new trial will not correct the illegality of the classification that now appears from the record. Under the circumstances the judgment should be reversed and the trial court should be ordered to dismiss the indictment and discharge the petitioner from custody. *Smith* v. *United States*, 150 U. S. 50; and *Baltimore Carolina Line* v. *Redman*, 295 U. S. 654.

CONCLUSION.

WHEREFORE the petitioner prays as in his petition for writ of certiorari and as in his main brief that the judgment of the trial court and of the court of appeals be reversed and that the cause be remanded to the trial court with instructions to dismiss the indictment and for discharge of petitioner from custody. In the alternative, the petitioner prays for a remand of the case with instructions for a new trial as prayed for by the respondent in its brief. Petitioner prays for such other and further relief to which he may show himself justly entitled.

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